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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 548

BUFFALO FAULTLESS PANTS COMPANY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 2a–7a) is reported at 142 F. Supp. 594.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 5, 1956 (R. 39). By order of Mr. Justice Black, dated September 4, 1956, the time to file a petition for a writ of certiorari was extended to and including November 3, 1956 (Pet. App. 7a). The petition for a writ of certiorari was

filed on November 3, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly rejected petitioner's claim under the Lucas Act, for losses sustained in the performance of certain war contracts, on the ground that the losses incurred were the consequence of petitioner's fault or negligence in the performance of those contracts.

STATUTE INVOLVED

The War Contracts Hardship Claims Act (commonly referred to as the Lucas Act), 60 Stat. 902, as amended, 41 U. S. C. 106 note, provides in pertinent part:

> Where works, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under Section 201 of the First War Powers Act, 1941 (50 U. S. C. Supp. IV, App., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including dimi-

nution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. * * *

* * * * *

SECTION 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, * * *.

* * * * *

SECTION 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims * * * asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled * * *.

STATEMENT

This action was brought under the Lucas Act, *supra*, pp. 2–3, to recover $91,086.36, the amount of loss incurred by petitioner in the performance of two wartime Government contracts for the manufacture of

knee length, khaki cotton trousers.[1] The Court of Claims found that the losses were, at least in substantial part, due to the fault of petitioner and that therefore it was not entitled, under the Act, to the relief sought (R. 52). The relevant facts may be summarized as follows:

Petitioner manufactures men's trousers, pants, and shorts in Buffalo, New York (R. 39). On December 31, 1942, and thereafter on January 20, 1943, petitioner entered into two separate contracts with the War Department for the manufacture of a total of 350,000 pairs of cotton khaki, knee length trousers at the price of $0.80 per pair (R. 40–42). By the terms of the contracts, cloth was to be furnished by the Government, and the other materials by the contractor (R. 41–42). Deliveries were governed by specific schedules established under each contract (R. 41–42).

These contracts were among twenty-nine such contracts placed by the Government, at comparable prices, to meet lend lease obligations (R. 42). Five of these contracts were placed in the Buffalo area. Both petitioner and the Government contracting officer knew that Buffalo was at that time an area where a severe labor shortage existed (R. 42).

As of December 31, 1942, petitioner had only thirty to thirty-five employees and forty single needle ma-

[1] During the period from September 16, 1940 to August 14, 1945, petitioner had entered into seven contracts with the Government (R. 40). Its total loss on all seven contracts, five of which were satisfactorily performed prior to December 1942, was $94,395.48 (R. 40). The present action sought recovery for losses—stipulated to be $91,086.36—incurred under two contracts (R. 40).

chines (R. 40). Its maximum production at that time were about 700 pairs of trousers per day, whereas the contracts necessitated maintenance of a production rate of about 4,000 pairs of trousers per day (R. 40, 44). Shortly after the execution of the contracts, petitioner hired two additional foremen with long experience in the manufacture of pants (R. 43). They, together with another foreman who had been employed by petitioner for a number of years and an experienced production man employed as plant superintendent (R. 43), constituted petitioner's supervisors of factory labor (R. 43). A number of operators with little or no experience in the needle trades were hired (R. 45). Because of other, higher paying, war industries in the Buffalo area, there was a substantial turnover in sewing personnel (R. 45).

Petitioner had bid on the first contract with the understanding that it would receive a preference rating to enable it to purchase certain items of machinery (R. 41). The necessary preference rating was issued (R. 42). However, petitioner was unable to secure enough equipment to produce the trousers in sufficient numbers to maintain contract schedules (R. 43–44).

Soon after petitioner began operations on these contracts, certain difficulties in production became evident (R. 45). Deliveries fell greatly behind schedule and there was an extremely high rejection rate, due mainly to deficiencies in sewing operations and failure to follow contract specifications (R. 45–46). On March 17, 1943, a representative of the Philadelphia Quartermaster Depot made an investigation to

ascertain petitioner's plant difficulties (R. 45). He was told by petitioner's officers of their difficulties in securing trained workers and machinery (R. 45). He also observed that the work in the cutting room had advanced far ahead of the other factory operations and that there was a great excess in cut garments over the amount that could be then utilized for sewing (R. 45). Overcutting is not a good practice in a clothing factory, since the overcut cloth takes up space and has a tendency to unravel and become dirty (R. 45).

Because of the continuing delinquency in deliveries, another Government representative investigated the conditions at petitioner's factory on May 14, 1943 (R. 46). He observed that the plant was greatly overcut and that of the two-day-shift and two-night-shift lines only one was operating satisfactorily (R. 46). The inefficiency of the operators he found to be due largely to lack of adequate supervision (R. 46). Overcutting had resulted in bundles of cloth, covered with a thick coating of dust, being piled under every cutting table and in every available spot where they might be placed (R. 46).

During this period of time, petitioner had salesmen on the road engaged in taking orders for civilian business (R. 49). Petitioner removed from 25 to 50 percent of its labor from work on the two Government contracts to begin civilian production (R. 49). Accordingly, labor which had been trained in sewing under Government contracts was diverted to fulfill petitioner's civilian business orders, although,

at the time, petitioner was far behind schedule on the Government contracts (R. 49).

On May 13, 1943, after 68,200 pairs had been shipped under the Government contracts, petitioner requested an increase in the contract price from $0.80 to $1.01 per pair, on the grounds that it had miscalculated both the wage rate and production difficulties (R. 12–14). The letter represented that petitioner then had 500 good machines already set up and in proper condition and 500 experienced operators ready to complete performance (R. 14). Subsequently, on June 8, 1943, petitioner telegraphed the Philadelphia Quartermaster Depot (R. 14–15):

> Re Contracts 24956 and 25778 losses to date in excess of $50,000 due to unexpected high labor costs and unforeseen manufacturing difficulties. Have computed present cost of $1.01 per pair including overhead but not including profit to prevent further loss and enable us to continue to manufacture. We request change in price to $1.06 per pair or cost plus basis. Have 203 machines available and 250 trained operators. Can produce and ship approximately 7,500 pairs per week probably more. Will furnish any further information desired.

Petitioner relied upon the communications of May 13, 1943 and June 8, 1943 as its written requests for relief as required by § 3 of the Lucas Act, *supra*, p. 3, (R. 49).

On June 24, 1943, the contracting officer inquired of petitioner whether it would agree to a termination of its right to produce and deliver the uncut quantity of trousers under the contracts at no cost to petitioner

except loss of anticipated profits (R. 51). Petitioner agreed on June 29, 1943 (R. 51–52), and, accordingly, the contracts were terminated. Petitioner, at that time, had produced approximately 155,000 of the 350,000 pairs of trousers covered by the two contracts (R. 52).

On February 6, 1947, petitioner filed a claim for relief under the Lucas Act with the War Department (R. 52). The War Contract Hardship Claims Board denied this claim (R. 52). Thereafter, on May 18, 1949, within the statutory period, petitioner brought this action in the Court of Claims (R. 3–6), which also denied relief (R. 39).

The court found "from all the evidence in the record * * * that in sustaining the stipulated losses * * * plaintiff was not without fault and that these losses were at least in substantial part due to the fault of the plaintiff" (R. 52). Deficiencies in organization and management, declared the court, were largely responsible for petitioner's losses (Pet. App. 6a). In this connection, the court stressed the fact that petitioner diverted part of its productive capacity to civilian commitments (Pet. App. 6a). Some of the commitments, it pointed out, were incurred while petitioner was experiencing its difficulties with the military work, and some of the diverted labor had undoubtedly been trained on the military contracts (Pet. App. 6a).

The court also recognized that petitioner operated under difficult conditions in that it undertook to perform contracts requiring great expansion of production, machinery, and labor (Pet. App. 7a). While the

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court noted that perhaps in those circumstances anyone would fail (Pet. App. 7a), the court concluded that in view of petitioner's deficiencies in organization and management in meeting these problems, its failure was attributable largely to factors for which it had assumed responsibility (Pet. App. 7a).

ARGUMENT

The Court of Claims has found, upon careful consideration of an extensive record, that the contract losses for which recovery is now sought "were at least in substantial part due to the fault" of petitioner. Accordingly, the prerequisite for relief under the Lucas Act, *supra,* pp. 2–3—absence of fault or negligence on the contractor's part—had not been met.

Significantly, petitioner does not controvert the factors which impelled the lower court's critical finding that "deficiencies in organization and management were largely responsible for plaintiff's losses" (Pet. App. 6a). Nor does it contend that inefficient planning and operations are inappropriate grounds for denial of Lucas Act relief. Cf. *Milwaukee Engineering and Shipbuilding Co.* v. *United States,* 129 C. Cls. 167; *Reltool Service Co.* v. *United States,* 128 C. Cls. 14. Rather, it is petitioner's basic premise that the court below utilized erroneous standards in determining that fault or negligence underlay petitioner's losses. The Court of Claims, petitioner declares, applied "a legal concept of negligence which involves not the standard of the reasonable man but that of a perfect man—in other words, any mistake or error regardless of circumstances is negligence" (Pet. 6).

BLEED THRU

This contention is belied, of course, by the various instances of petitioner's conduct considered by the court, *e. g.*, heedless overcutting; inadequate supervision of the machine operators to enable compliance with contract specifications; and the fact that, while experiencing its production difficulties on the two Government contracts, petitioner actively solicited concurrent civilian business and diverted from 25 to 50 per cent of its labor force, trained under the Government contracts, to fulfill its civilian orders. Moreover, petitioner's contention is conclusively negated by the very language of the decision. Thus, the opinion states that "We do not think that a mere minor fault would preclude plaintiff's recovery" (Pet. App. 6a). The court goes on to add, however, that this was not such a case, since petitioner's losses were "largely attributable to its own poor organization" (Pet. App. 7a).

Petitioner seeks to read the decision below as being predicated on the court's speculation that "[p]erhaps anyone was bound to fail" in circumstances where delivery was undertaken pursuant to contracts requiring great expansion of production, machinery, and labor (Pet. App. 7a). Petitioner emphasizes this comment of the court in an attempt to make what is essentially a factual finding of negligence appear to be a question turning on the appropriateness of the legal standards applied. However, the court makes clear immediately after this comment that "in view of plaintiff's deficiencies in coping with the managerial problems which such an expansion raises, plaintiff's failure is attributable largely to factors for which plaintiff assumed responsibility" (Pet.

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App. 7a). Thus, while operations undeniably were hampered by a labor shortage in the area—a condition petitioner was aware of at the time it submitted its bids—it was petitioner's faulty utilization of the labor on hand that the court found basic to its losses.

It may well be argued that petitioner's blind undertaking of contracts far beyond its existing capacity has, in itself, elements of fault, and that the consequences of such haphazard action should not be visited on the Government. Cf. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120, 124.[2] Indeed, petitioner is fortunate that the Government was willing to terminate the contracts when less than half performed. In any event, petitioner's deficiencies in coping with the concomitant problems of the ensuing expansion—the basis of the Court of Claims' finding of fault—alone sustains denial of relief.[3]

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[2] At the time petitioner submitted its bid on the first contract to supply 250,000 pairs of trousers at $0.80 per pair, it made an alternative offer to supply 500,000 pairs at $0.85 per pair (R. 40–41). Fortunately for petitioner, the Court of Claims observed, the alternative offer was not accepted (Pet. App. 6a).

[3] Even if the losses incurred had not been the result of its own mismanagement, petitioner's claim is far in excess of the amount to which it would have been entitled under the Lucas Act. Thus, the telegram of June 8, 1943, relied upon by petitioner as the written request for relief required by the Lucas Act, sought an increase in the contract price from $0.80 to $1.06 per garment—an additional $0.26 per garment (R. 48–49). However, in the Court of Claims, petitioner sought $91,086.36 for the 155,000 garments delivered prior to termination of its contract obligations on July 10, 1943. This would amount to approximately $0.59 per garment. The Court of Claims has previously held, in interpreting Section 3 of the Act, *supra*, p. 3, that a contractor cannot recover an amount greater than that requested in the initial claim for relief. *A. J. Spicer* v. *United States*, 127 C. Cls. 428; *Louis Rosner* v. *United States*, 125 C. Cls. 614.

LEED THRU

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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